APPENDIX A.

DISPOSITION IN COURT
OF
DEFENSIVE ISSUES PLEADED
ON WHICH
SPECIAL FINDINGS WERE REQUESTED
BUT WERE NOT MADE
BY THE CHANCELLOR
AS TRIER OF FACT

TEXT OF LETTER FOR REFERENCE

APPENDIX A.

ISSUES OF FACT PLEADED BY PETITIONERS' ANSWER (R. 19-42).

WITH REQUEST AT OPENING AND CLOSE OF TRIAL (R. 41-42, 210)

FOR SPECIAL FINDINGS OF FACT BY CHANCELLOR AS TRIER OF FACT, AS REQUIRED BY SECTION 1390, MISSISSIPPI CODE, 1942,

AND DISPOSITION THEREOF BY THE CHANCELLOR AND BY THE STATE SUPREME COURT

FIRST DEFENSE.

PETITIONERS' PLEADING.—In their answer the issues pleaded were:

The Petitioners "made no complete and final offer" to the Respondent "prior to their draft of the 'Agreement and Warranty Deed Covering Land' of April 13, 1957" (R. 41-42, 29, 38, and 63-76, giving text of said proposed "Agreement and Warranty Deed").

The letter of March 2, 1957, giving the proposed terms of sale for cash did not contain all the essential terms proposed, and the Petitioners' letter of March 5, 1957, stipulated that no obligations were assumed before actual payment of the purchase money, and that the offer to negotiate of March 2nd was a simple offer without consideration and was revocable at any time before payment (R. 24, 28, 33).

The Respondent complained of hardship to his family (R. 36), and Petitioners then again proposed (R. 36) a

Family Settlement on reasonable terms, including the stopping of the unfounded suit over what person was "Rosalind Gwin Hutton", and who was "Rosalind Gwin Hutton III" (R. 33, 55); and the two March 2nd letters were an incomplete part of the proposal and transaction (R. 27, 32, 34-38).

The two March 2, 1957, letters (which were delivered manually to Respondent at the same time, R. 241, 242), contained a condition precedent to opening negotiations, namely:

(1) Making by Respondent of written apology for insults before negotiations to sell land would begin (R. 27, 28, 34); and

(2) Payment by Respondent of the defaulted note held by the Estate (R. 27).

These same conditions are reiterated in the March 5, 1957, letter to Respondent from J. B. Hutton, Jr. (R. 28, 59).

The March 2nd letter by Petitioners on proposed sale terms was written to enable the Respondent to apply for a loan and to see whether he could raise the purchase price, and was not written or understood as an offer open for binding acceptance by a promise to pay, or in any other way beside actual payment in exchange for a deed to be agreed upon: no contractual intent was present or shown by it to enter an executory, legally binding agreement (R. 27, 28, 31).

As stated, the March 5, 1957, letter from Petitioners to the Respondent also gives the conditions of negotiation and proposed sale for cash, and was written before the resale opened (said required apology having been written, quired apology was made and negotiations for the land

March 8, 1957, and accepted March 20, 1957) (R. 28). These conditions were part of Petitioners' offer to negotiate, proposed not in a contract document but in a series of letters discussing the proposal, in none of which is the intention shown of constituting the letters into a contract summing up and integrating the proposed terms as binding and accepted by the parties to a contract (R. 28, 59).

PETITIONERS' EVIDENCE. — The Petitioners' first letter of March 2, 1957, is in evidence showing a written apology was a condition precedent to transaction of any business whatever (R. 241-242), and the evidence also shows that this letter was delivered by hand to Respondent, along with the second letter of March 2, 1957, stating the proposed terms and price (R. 241). To the required apology dated March 8, 1957, which was mailed by Respondent to Mrs. Johnson in Jackson, Mississippi, Mrs. Johnson stated by letter of March 9, 1957, that she would forward it to Maryland to J. B. Hutton, Jr., and that a reply would be made when he received it. Petitioners made this reply on March 20, 1957, and stated that work had begun on the deed, thereby indicating acceptance of the apology and the opening of negotiation of the proposed land sale (R. 268, 269, 296, 297, 382). The evidence shows also that Respondent stated he received on March 10, 1957, J. B. Hutton, Jr.'s letter of March 5, 1957, stipulating that the proposed sale was for cash without obligation on Petitioners until cash was paid in full for the deed (R. 270). This is significant as showing before the apology had been accepted and negotiations had begun the Respondent had in his hands the said letter of March 5th and he knew the Petitioners' intentions not to be obligated before actual cash payment.

As a part of their answer, Petitioners made formal tender and offer to prove the exhibits (R. 45-78), attached

to the answer, as permitted by cited Mississippi statute (R. 44), These documents were offered to show there was no contractual intent in the March 2, 1957, letter on price to make a final offer, but that the Petitioners' final offer was drawn up in the 6-page draft of an "Agreement and Warranty Deed" submitted to Respondent on April 13, 1957; and that the Respondent inequitably misled them in his inconsistent conduct in the proposed Family Settlement.

Then at the trial, the Petitioners offered to prove Exhibit 6, the letter of January 29, 1957, proposing a Family Settlement (R. 55), and also a similar letter of January 14, 1957; but both letters were excluded on objection of Respondent's counsel to any letters before March 2, 1957 (R. 324, 355, 357-360); but were admitted for identification (R. 388).

The Chancellor ruled that evidence of prior letters was inadmissible, and excluded same, because he said the letter of March 2, 1957, giving the proposed price was not ambiguous and could not be added to and was not subject to interpretation (R. 359-360), thereby closing all avenues of proof to the pleaded issue of want of contractual intent and of no integration of the March 2 letter into any writing or series of writings constituting a contractual offer or contract. The Chancellor confused Petitioners' intent not to create a contract by their writing the simple letter of March 2nd on negotiation with the general rule excluding parol evidence of intent in using the language in some established and clear contract

Therefore, on this crucial issue the series of letters made exhibits, as Exhibit 6, letter of March 29, 1957, and similar letters, as that of January 14, 1957, was excluded, and proof of the conditions, representations, and terms of the proposed Family Settlement was shut out because of the conclusive presumption, begging the question at issue

that the letter of March 2, 1957, was a final offer to contract, beyond rebuttal showing the real intent and purpose of the parties in writing it.

The materiality of this evidence and of offered but excluded testimonial evidence appears in the recitals in both the draft of a deed prepared by the Respondent and also in the draft prepared by Petitioners, reciting that Mrs. Rosalind Gwin Hutton Johnson was the intended devisee of the land willed to "Rosalind Gwin Hutton", as the court decree of March 1, 1957, had held and not Respondent's Daughter, Rosalind Gwin Hutton, III. These recitals support the Petitioners' allegation that recognition of this decree of March 1, 1957, was understood to be one of the chief points of the proposed Family Settlement. These drafts of deeds are in evidence (R. 276, 64, 251); but the legal effect and significance is made unmistakable from the excluded letters and testimony to verbal acts of the parties to the transaction, making cessation of litigation by Respondent against Petitioners an essential condition of the whole proposed Family Settlement.

But the foregoing was harmless error in the trial Court because the decree was in favor of the Petitioners whose evidence was excluded. However, the erroneous exclusion of the evidence becomes prejudicial when the decree of the Chancellor for the Petitioners is reversed and the appellate court undertakes to decide issues of fact on a restricted record. Therefore, Petitioners must have a new trial and an opportunity to re-offer this evidence, and to have findings made, if a fair trial is to be given.

Again, the Petitioners sought to show and asked questions of three witnesses and actors in the transaction of March 2, 1957, namely, the Respondent himself, as a witness, and Mr. Russ M. Johnson, and J. B. Hutton, Jr., to

show the intent of the parties on the status of the simple two letters of March 2, 1957, offering to negotiate, and to put the letter on price in a form to be used in a loan application, without obligation on Petitioners, and that same were not intended to be contract documents. But the Chancellor, on objection of the Respondent, completely excluded all questions of these witnesses to the entire transaction of March 2, 1957.

Petitioners' counsel asked the Respondent whether, when he offered to buy the land on March 2, 1957, it was his intention to stop litigation as to the land title or to continue it. Respondent's counsel objected, and the Chancellor sustained the objection, after argument. The Chancellor said, You have nothing but his word for it, he could say he did not intend to stop the litigation (R. 329). Then the Petitioners' letter of January 29, 1957, was offered on the "meaning and intention and interpretation, the surrounding circumstances, where the contract is in dispute as to the intent and purpose of the parties" (R. 324); Respondent objected; and the Chancellor sustained objection and excluded the evidence. Similar questions as to the understanding and agreement to end litigation were attempted in the examination of Mr. Russ M. Johnson and J. B. Hutton, Jr., but the examination was not permitted (R. 377, 353).

DENIAL OF DUE PROCESS FROM CHANCELLOR'S CONCLUSIVE PRESUMPTION OF CONTRACTUAL INTENT IN EXCLUDING EVIDENCE SHOWING NON-CONTRACTUAL PURPOSE AND INTENT. — To the Petitioners' question to the Respondent as a witness as to whether there had been other efforts to buy this land before March 2, 1957, Respondent's counsel objected that to go back of March 2, 1957, was incompetent, saying "parties are presumed to say what they intend regardless of cir-

cumstances"; and the Court ruled that any details prior to the immediate circumstances were incompetent (R. 327), and then sustained objection to question as to when he had tried to buy the property (R. 328).

Petitioner, J. B. Hutton, Jr., as a witness, offered to introduce into the record the series of letters exchanged between Respondent and himself showing the letter of March 2, 1957, is not and was not intended to be a contract (R. 354, the objection cutting into the question). The Chancellor said it appeared to him that prior letters were merged in the "offer", and should have been put into the "offer", and that no ambiguity had been "cited" in the "offer" (R. 355).

The Chancellor assumed the March 2 letter was a "contract", the point in issue, as the reason for excluding all the Petitioners' evidence to show a different purpose was intended, namely, to show willingness to forget the insults if an apology was made and to enable the Respondent to apply for a loan to see if he could raise the purchase money. The Chancellor said, "the full offer as made by them is stated by their letter of March 2nd." (R. 356). "It would appear to me that this offer is made just flat out", but that he would not prejudge the matter (R. 357-358). However, the Court excluded the letters showing the intention of the Petitioners to end the litigation as the condition of negotiations (R. 360), because "the offer made in the letter of March 2nd is clear and unambiguous and would not be subject to any interpretation or anything else. All of the offer is clear on its face" (R. 360).

Thus, both testimonial evidence and also the letters of January 14 and 29, 1957, proposing an end of litigation and a Family Settlement with Respondent were excluded. This cut off all proof that the two March 2 letters as to

required apology and stating the proposed price were not written for the purpose of making a final or complete offer to sell but were only an offer to negotiate, expressing willingness to accept an apology and then only to negotiate.

This simple note of March 2nd stated: We will sell for cash; and was but one in a series of letters urging a settlement of claims, where there was no proof of final integration of the letters into a complete contract. This ruling of the Chancellor in effect adopted a conclusive and an arbitrary presumption that this simple note was written with contractual intent to be bound by a promise to pay, excluding explanatory and rebutting evidence of a different intent, and hence is a denial of Due Process.

NO RULING OF CHANCELLOR ON THE FIRST DEFENSE. — The Chancellor stated this defense in substance, viz., "that the offer of March 2 was modified by the letter of J. B. Hutton, Jr., of March 5, 1957, prior to any acceptance by the Complainant" (R. 398); but the Chancellor made no further comment or finding on this first defense of the Petitioners.

Instead, he ruled (on the second defense), that "no binding contract to sell resulted from the offer of March 2, 1957, and the purported acceptance thereof as contained in Complainant's letter of March 6, 1957," because the alleged acceptance "changed the terms thereof materially" (R. 404), in that it "provided that payment would be made by cashier's checks", and "did not accept the offer requiring cash to be paid" (R. 403).

Therefore, it appears that no other defense was made subject of a finding by the Chancellor, and the Chancellor expressly stated no finding was necessary as to Respondent's inequitable conduct as alleged by Petitioners.

FINDING *DE NOVO* AND DECISION OF STATE SUPREME COURT ON FIRST DEFENSE. — On the first defense of the Petitioners, the State Supreme Court found and held: "Beyond question, the Appellees [Petitioners here] by their letter of March 2, 1957, made an *unconditional* offer to sell to appellant, by warranty deed, their rights in the 507 acres of land, more or less, devised them by their Mother, for $30,000 cash * * *" (Italics added).

Thus, this issue was found against the Petitioners without the required findings by the Chancellor on an erroneously restricted record, nullifying contrary to Due Process the undisputed condition of March 2nd requiring written apology before negotiations opened, and also nullifying the March 5th letter defining the proposed sale for cash as without obligation until cash was paid.

ORDER DENYING REMAND FOR TRIAL OF DEFENSIVE ISSUES OF ANSWER. — On motion for new trial to implement Due Process rights asserted in the Suggestion-of-Error of Petitioners, the Petitioners asked for remand for plenary trial *de novo* "in order that the complete set of letters, and acts of the parties, verbal acts and *res gestae* may be developed on the issues of the case, especially as to the intent of the parties, and as to what documents properly constitute the Appellees' [Petitioners' here] offer to negotiate and the Appellant's alleged acceptance." The present record shows that the Chancellor exercised his discretion to exclude evidence in support of the pleadings of the Appellees and the exhibits to their answer. The entire transaction is competent and will demonstrate that the parties to this case never came to an agreement, there was no meeting of the minds and intentions of the parties on any agreement, and the action of the Appellant should be dismissed." (R. 485)

On May 2, 1960, and again on July 11, 1960, the State Supreme Court made an order refusing trial of the said defenses of Petitioners' answer and exhibits, pretermitted by the Chancellor (pp. B-26, B-27, below).

DENIAL OF FAIR TRIAL AND DUE PROCESS ON FIRST DEFENSE. — On the foregoing matters of this record, the Petitioners have had no required findings at the trial, and no opportunity to object to exclusion of evidence vital to their defenses, since Petitioners won in the trial Court, and the error was harmless in a proper appeal reviewing said decree. But the combined effect of the exclusion of the evidence at trial which supported the defensive issues, and of the reversal of the decree and making of findings *de novo* on these issues in the appellate Court deprives the Petitioners of a fair trial and Due Process guaranteed by the Fourteenth Amendment as declared in a similar situation in *Saunders* v. *Shaw*, and deprives them of the right to findings by the Chancellor, required by the Mississippi statute and the appellate limitation on the power of the State Supreme Court, as a matter of procedural Due Process. Cf. *Kelley* v. *Everglades Drainage District*, on invalidity of a judgment made without required findings of fact.

SECOND DEFENSE

PETITIONERS' PLEADING.—The Petitioners pleaded that the Respondent's "letter of March 6, 1957", alleged to be a binding acceptance, "is a counter-offer and is not an acceptance of terms proposed or offered by" the Petitioners (R. 26, 42).

In particular, the said letter of March 6, 1957, is not a legal acceptance because no final, complete offer by Pet-

tioners had been made (R. 25); because it does not purport to be and is not an acceptance of terms proposed by the Petitioners (R. 25); because it states on its face it is an acceptance as per "this" letter, of March 6, 1957, when reasonably read in its own context, in which "this" in the letter itself refers to "this" letter of March 6, 1957, acknowledging receipt of "your" letter of March 2 (R. 25); and because it makes a counter proposal of a promise to pay, as distinguished from actual cash payment (R. 25), and the land description in the proffered deed drafted by Respondent is incorrect (R. 23), calling for conveyance of mineral rights not owned by Petitioners, and not offered for sale, but belonging to C. D. Hutton and Mrs. Susan Smith; and also because cashier's checks were proposed in place of cash, cashier's checks being subject to stop-payment by a bill to enjoin payment, and subject to solvency of the cashier.

FINDING OF THE CHANCELLOR. — While the Chancellor did not expressly construe the phrase "*as set forth* in *this* letter", in Respondent's March 6th letter,[1] by necessary implication he construed it as a restrictive qualification confining his proposition to the very terms set forth in "this" letter of March 6th, substituting cashier's checks for cash, and therefore a material variance.

The Chancellor did not notice the substitution of a promise to pay in place of the act of cash payment which last Petitioners stipulated, and did not notice the dis-

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[1] ... March ... 1957 ...

"This is to acknowledge receipt of your letter of March 2 1957. I hereby accept your offer as set forth in this letter ... etc." giving his counter terms (R. 400). Then follow the state-ment. Upon execution of the deed I left with Mr. ... I will deliver ... a cashier's check for $30,000 etc. ... (R. 400) (Italics added)

crepancy in interests to be granted under Respondent's draft of a deed from Petitioners' proposal only to sell their interests, the Respondent's draft including interests of C. D. Hutton and Susan Smith in minerals (R. 23).

RULING OF STATE SUPREME COURT. — The State Supreme Court concluded that Petitioners did not mean cash by using the word "cash", "but if they did so intend, the Appellant would have had the right to conform thereto at the time of the exchange." (R. 438). The Court held that the time of exchange of cash for the deed did not come (R. 435), because the Petitioners "repudiated their agreement" (R. 435), and that the Petitioners were bound because the March 6th letter by Respondent was an unqualified acceptance (R. 436), and was not conditioned on following the directions and proposals contained in it, which the Court said Respondent "suggested" (R. 436).

REQUEST OF PETITIONERS' SUGGESTION-OF-ERROR. — The Petitioners' Suggestion-of-Error requested remand for trial of this issue as to the non-responsiveness of the purported acceptance. The most important of the defenses made here were that the March 6th letter preceded the making of the required apology of March 8th and acceptance of it on March 20th, that the Petitioners' March 5th letter stipulated that the cash sale meant a cash sale without obligation until cash was paid, and that the Respondent proffered his *promise* to pay in lieu of *actual* cash payment, and offered a deed including mineral interests not proposed to be sold. No finding was made in the trial court on these important issues, as required by Section 1390 Mississippi Code of 1942. Testimonial evidence was excluded as to the intent of the parties and the place in the negotiations this letter of March 6th actually had, as one of numerous proposals made by Respondent and not accepted by Petitioners. If the time for the ex

change of cash for a deed did not arrive, and it did not arrive, it was because the Respondent dropped the proposal for an amicable settlement, went back into the court fight, and failed to complete negotiations and conditions required by Petitioners. On these matters Petitioners are entitled to a finding after a fair trial.

THIRD DEFENSE.

PETITIONERS' PLEADING.—The Petitioners pleaded that the Respondent "made no valid acceptance" of Petitioners' "proposal for an agreement and deed of April 13, 1957" (R. 29, 31, 34, 42).

THE EVIDENCE. — The Respondent admitted at trial that he had expressly rejected the "Agreement and Warranty Deed Covering Land", prepared by Petitioners and sent to Respondent on April 13th, which Petitioners allege to be their only complete and final-form offer (R. 285, 286); although the Petitioners testified that they never received the alleged written rejection of May 30, 1957, as distinguished from rejection by ignoring it and refusing to comment, and Petitioners testified they knew nothing of the May 30, 1957, letter until the trial (R. 361-362, 379, 384-385).

NO FINDING OF CHANCELLOR. — This is another pretermitted issue, dependent of course on the first defense of the Petitioners, a finding on which was pretermitted. On this issue, except as to the cash requirement, the Chancellor made no finding or decision, but confined his ruling to the single point that the alleged acceptance did not comply with the proposal that cash should be paid, but substituted a counter proposal of payment with cashier's checks

FINDING OF STATE SUPREME COURT.—The State Supreme Court found *de novo* that the letter of March 2, 1957, stating the proposed price and the proposed terms was unconditional (R. 432), and on March 6, 1957, was unqualifiedly accepted (R. 436), and so has omitted this issue.

CONSEQUENCE OF COURT DECISION. — On this third defensive issue and its related issue, the first defense, Petitioners have had no trial, though moving for same in the motion implementing the Suggestion-of-Error, and in motions of June 28, 1960.

FOURTH DEFENSE.

PETITIONERS' PLEADING.—The Petitioners pleaded, "It is inequitable" for the Respondent to enter negotiations for an amicable settlement of litigated claims and for sale of land, and to attempt to hold the three Petitioners "as obligated to enter such contract and sale and to execute a deed, and pay him damages, and at the same time to litigate title to one share of the land" (R. 42). "Under all the circumstances the" Petitioners "considered and understood that by his said offer the" Respondent "accepted the decree of the Chancery Court confirming the title of Mrs. Johnson to 1/3 of the said land; and with this belief they opened negotiations on condition that first an apology in writing should be made, that the 1956 rent note should be paid and the 1957 note provided for, etc." (R. 38). Respondent "stands in an inequitable and inconsistent position" (R. 41). Petitioners "should not be misled by" Respondent "in offering to buy the three shares of the land as if he recognized title, dropping negotiations, reopening litigation by appealing from the decree that confirmed title to a share, and then demanding a deed to

the land a year and three months later, and demanding $10,000 damages for the delay while he was fighting the case on appeal attacking the title" (R. 40).

Respondent's inequity consists in dealing with Petitioners as and on the basis of members of the same Family negotiating an amicable settlement of all his claims, and then in attacking a Petitioner's title in his Daughter's name while trying to buy land from them in an amicable settlement, thereby deceiving and misleading them, and also speculating on the outcome of his pending lawsuit (R. 41).

Respondent as maker of notes due the Estate used the unfounded claim of his Daughter as alleged successor of the payee of the notes as an alleged reason not to pay the notes as maker into court. Respondent has not performed the condition made by Petitioners that he must pay the 1956 note and secure the 1957 note before they would sell their future interest in the said land, at expiration of his 1957 lease. Respondent has not met this condition in good faith (R. 41).

The Respondent "did not recognize then the title of Mrs. Johnson in 1/3 of the land as stipulated in correspondence between the parties and as set out in" Petitioners' "draft of a deed, but resumed his attack thereon by perfecting an appeal in the Supreme Court of Mississippi from April 26, 1957, until final decision on June 8, 1958, thereby breaking up the negotiations." (R. 22, 23, 26).

The Respondent from April 26, 1957, to June 9, 1958, claimed in court that title to 1/3 of the land was in his minor Daughter, and not in Mrs. Johnson, a Petitioner; but now he alleges that all this time he held a valid contract and equitable title to the land in his own name, and was willing to pay Mrs. Johnson all the while for her land while

he was fighting her in his Daughter's name, and he also now claims $10,000 damages for the delay while he was playing this game in court (R. 30, 39). In this course he misled and inequitably induced the Petitioners into believing he approved the decree finding Mrs. Johnson had title; and with this understanding the Petitioners undertook to negotiate a sale of the land; only to find that they had been inequitably misled (R. 37-38).

The Respondent has entered the land as a trespasser and has interfered with and prevented the Petitioners having the use and control of the land. This is not equitable (R. 22, 26, 39, 120).

PETITIONERS' EVIDENCE EXCLUDED.—The Chancellor excluded all letters and all testimonial evidence offered by the Petitioners to show that the Respondent and the Petitioners both proposed an agreement for the Respondent to stop litigating over the amount and the proper payee of the notes made by the Respondent, and over the well known identity in the Family of "Rosalind Gwin Hutton" as Mrs. Johnson, and not the Respondent's Daughter who is referred to in the Will as "Rosalind Gwin Hutton, III" (see page 222 of the present record giving photostatic copy of holograph Will so naming Respondent's Daughter). The negotiation of March 2, 1957, as to apology and land sale was on the day after the decree finding that Mrs. Johnson was "Rosalind Gwin Hutton", and as such owned the land. The drafts of deeds prepared both by Respondent and Petitioners stipulated that Mrs. Johnson owned the land (R. 276, 64, 251). But the Respondent reopened the legal attack on the decree and the title on April 26, 1957 (R. 339). This was contrary to the proposed agreement, and bars Respondent's enforcing the alleged Family Settlement Agreement, because it was never entered. It was merely proposed, and Respondent

dropped it. Petitioners then wrote Respondent that it had been closed.

EXPRESS AND INTENTIONAL OMISSION BY THE CHANCELLOR OF FINDING ON RESPONDENT'S IN. EQUITABLE CONDUCT ALLEGED BY PETITIONERS. BECAUSE UNNECESSARY IN RENDERING DECREE FOR PETITIONERS.—The Chancellor ruled:

> "Since there was no binding contract for the sale of said lands, it is unnecessary for the Court to pass upon the question as to whether or not the remedy of specific performance should be denied to the complainant because of any inequitable conduct on his part as alleged by the defendants." (R. 404).

FINDING *DE NOVO* BY STATE SUPREME COURT. THAT RESPONDENT ACTED EQUITABLY IN HIS MISLEADING TREATMENT OF PETITIONERS IN CHANGING HIS MIND ON STOPPING LITIGATION AND MAKING A FAMILY SETTLEMENT, AND NOW CHANGING IT AGAIN AND ALLEGING HE MADE A CONTRACT. —The State Supreme Court made the following finding *de novo* on a restricted record, and based judgment thereon:

> "Appellees [Petitioners] further say that Appellant [Respondent] was guilty of inequitable conduct on account of the fact that, subsequent to the contract, he appealed on behalf of his minor Daughter to the Supreme Court, in the case of Hutton v. Hutton, 293 Miss. 458, 102 So.2d 424, and thereby attacked the title of Mrs. Johnson; and besides, that he was in default in the payment of rents." (R. 438).

Then the State Supreme Court found that the Respondent had a right to appeal for his Daughter, and that this was equitable, and that non-payment of the notes also was equitable (R. 439). The Court gave inconclusive

reasons which ignore the restricted nature of the record from which evidence was excluded, which was offered to prove the issue of the conditions on which the Family Settlement was proposed, and whether Respondent had agreed with Petitioners on these conditions, including the dropping of further litigation on the unfounded claim for the Daughter based on the untrue allegation she was the only person named "Rosalind Gwin Hutton" and so was devisee. While Respondent had a right to appeal, he has no right to propose to agree to drop suit and pay his said notes for rent and then to drop this proposed agreement, fight on, and say he had agreed all the while!

CONSEQUENCE OF *DE NOVO* FINDING ON RESTRICTED RECORD THAT RESPONDENT'S TREATMENT OF PETITIONERS WAS EQUITABLE.—The consequence of the shift of ground of decision from the issue found by the Chancellor to the pretermitted issue of Respondent's inequitable treatment of the Petitioners, and the consequence of making a *de novo* decision on this issue on a record from which the evidence of inequitable conduct was offered but strictly excluded, is that the Petitioners have been denied completely any fair trial of this defensive issue which is a complete bar in law to the remedy of specific performance. And this is a denial of Due Process of Law.

FIFTH DEFENSE.

PETITIONERS' PLEADING.—The Petitioners pleaded that the Respondent has not paid the 1956 and 1957 rent notes held by the Estate, which payment was made a condition of completion of the proposed land sale within a reasonable time, and that such continued delay and default is not equitable (R. 25, 30, 42).

PETITIONERS' EVIDENCE.—Both the Petitioners' letters of March 2, on price and of March 5, 1957, make it clear that payment of the 1956 note which was past due and that securing the 1957 note were required before the Petitioners would sell their vested future interest in this land. It is not disputed that the notes are now unpaid.

CHANCELLOR'S FINDING ON NOTES.—The Chancellor made no findings as to the requirement that the rent notes must be paid to the Estate before the land would be sold by the Petitioners. He found no agreement was made between the parties in March, 1957. He did find that the Respondent offered no proof to support his pleaded claim of having paid part of the principal of the said notes, that the Executor was the holder, and he gave a decree for principal, interest and attorney's fees in favor of the Executor as holder of the notes (R. 405, 409, 410).

FINDINGS *DE NOVO* BY STATE SUPREME COURT THAT DEFAULT IN THE NOTES WAS NOT INEQUITABLE.—The State Supreme Court found that Respondent's default in payment of the rent did not render his conduct inequitable because payment of that obligation was provided for in the contract of sale (R. 439).

CONSEQUENCE OF DECISION OF STATE SUPREME COURT.—This finding that the Respondent's nonpayment of the rent notes, or the rent; was equitable is made on a restricted record and on a pretermitted issue. The finding deprives the Petitioners of an opportunity of showing by evidence that the payment of the notes to the Estate was made a precedent condition of the land sale by the Petitioners.

SIXTH DEFENSE.

PETITIONERS' PLEADING.—The Petitioners pleaded that the Respondent "has not used due diligence in negotiating the proposed sale to completion as required by the Petitioners' "offer to negotiate the sale on March 2, 1957" (R. 42). The Respondent dropped the proposed Family Settlement and has been an adversary in court since he decided on April 26, 1957, to appeal and attack the decree of March 1, 1957 (R. 30).

EVIDENCE AT THE TRIAL.—At trial the Respondent admitted attacking Mrs. Johnson's title on April 26, 1957 (R. 322, 323, giving date of bond for appeal as May 2, 1957; R. 339, giving April 25, 1957, as the day Respondent signed the papers, and April 26th as the day they were filed). Respondent testified that he wrote a letter and mailed it on May 30, 1957, rejecting Petitioners' April 13, 1957, draft of "Agreement and Warranty Deed Covering Land." (R. 285-286). Respondent took no further action until he lost his attack in his Daughter's name on Mrs. Johnson's title. Then in July, 1958, the present suit was filed. This delay is uncontroverted.

RULING OF CHANCELLOR.—The Chancellor made no finding or ruling on this defense.

FINDING OF THE STATE SUPREME COURT.—The State Supreme Court found *de novo* that the Petitioners had repudiated their agreement, although the issue had not been made subject of a finding, and the evidence of the transaction had been excluded. Nevertheless, the State Supreme Court held that the Respondent had six years in which to demand a deed, after the beginning of his attack, dropping negotiations and Petitioners' letters asking whether he had further interest, and closing the

negotiations when they heard nothing from him for approximately 6 weeks, April 13-May 31, 1957 (R. 438).

CONSEQUENCES OF DECISION.—The decision is believed to be unsupported by findings and evidence, and to be so extremely unreasonable as to be a complete denial of Due Process.

SEVENTH DEFENSE.

PETITIONERS' PLEADINGS. — The Petitioners pleaded that they "were entitled to close and did close the negotiations on May 31, 1957, without any breach of any duty to" the Respondent, "and without liability in damages to him, because the" Respondent "himself dropped negotiations and resumed litigation, instead of completing the proposed Family Settlement" (R. 25, 28, 29, 31, 38, 42).

The three parcels owned severally by Petitioners were too small to operate separately, and the Petitioners had agreed to cooperate with one another in managing the property; and therefore Respondent's attack on the title of one abandoned negotiations with all three of the Petitioners (R. 32, 40; 51, map).

PETITIONERS' EVIDENCE.—While the Petitioners' testimonial and written evidence was excluded, the part of the transaction reflected in the Petitioners' letters of April 13, 1957, and May 20, 25, and 31, 1957, shows *bona fide* exercise of the reserved right to revoke the negotiations stipulated in the March 5, 1957, letter to Respondent from J. B. Hutton, Jr. Respondent admitted making no reply to the series of letters except his alleged letter of May 30, 1957, that he had been away from home and made no effort to negotiate further (R. 272-273, 300-301, 298-299, 303-304, 285-286, 330-332).

CHANCELLOR'S FINDING.—The Chancellor made no finding on this defense.

FINDING *DE NOVO* OF THE STATE SUPREME COURT.—The State Supreme Court found on this pretermitted issue on a restricted record as follows:

> "Before the form of the deed was agreed upon, the Appellees [Petitioners] repudiated their agreement." (R. 435).

CONSEQUENCES OF DECISION.—On this record also the Respondent has a claim for $10,000 damages which has not been disposed of. The decision of the Court that Petitioners repudiated a legally binding agreement renders them finally and legally liable in damages to the Respondent in such sum as may be found on equitable principles. The judgment is prejudicial to Petitioners' property interests. Because it is based on no evidence, is not supported by required findings of fact, and exceeds the appellate authority of the State Supreme Court and also denies the fundamental fairness of the Due Process Clause of the Fourteenth Amendment which gives every litigant a trial of his defenses, the said judgment is believed to be invalid, and to be subject to correction by the Supreme Court of the United States under Due Process.

ISSUES IN ACTION ON RESPONDENT'S NOTES HELD BY THE ESTATE.

PLEADING OF THE EXECUTOR, ONE OF PETITIONERS.—The Executor pleaded that he is the holder of two negotiable notes totalling $3,200.00, both in default, made by Respondent on June 25, 1955, payable to Mrs. R. G. Hutton, and asked for judgment and equitable relief to enforce payment, and Petitioners sought to recover

possession of the land (R. 120-127). The declaration set out facts negativing the defensive facts alleged by the Respondent (R. 165), showing the agreed rent each year was $2,000.00 and the said two notes each for $1,600.00 were for the balance of rent, and that no payments thereon had been made by Respondent (R. 166-168). The Petitioners denied that the obligation of Respondent to pay the notes was based on any agreement whatever with them, either proposed or made, in March, 1957 or otherwise (R. 169). The Executor sued for principal, interest and attorney's fees (R. 169-170).

EVIDENCE FOR THE PETITIONERS.—The evidence for the Petitioners showed the written lease, the notes, nonpayment, and title of the Executor to the notes (R. 342-353, 367-371).

FINDING OF CHANCELLOR.—The Chancellor found the Executor was the holder, that the claimed set-off of payment by Respondent had not been sustained and no evidence of it was offered, and gave judgment for the Executor (R. 409, 405).

FINDING *DE NOVO* BY STATE SUPREME COURT. —The State Supreme Court made a brief finding reversing the Chancellor as to "rent, interest thereon, and attorney's fees." The Court stated: "If specific performance had been required, simultaneously with the consummation of the contract, the obligation for rent would have been paid and discharged in accordance with the terms of the contract" (R. 439). The Court stated that the Executor sued the Respondent "for the recovery of the rent notes" (R. 430), and that the Chancellor "awarded a decree for the rent and interest and attorney's fees" (R. 431). The Chancellor also awarded rent for the year 1958 (R. 408). Whence it appears that the Court reversed the Chancellor

as to the rent notes, and principal, and interest, but the point as to the principal is unclear. The reversal as to interest and attorney's fees is quite clear.

CONSEQUENCES OF THE JUDGMENT OF THE STATE SUPREME COURT AS TO THE RESPONDENT'S NOTES HELD BY THE ESTATE.—The judgment annuls the obligation of the contract made by the Respondent to pay interest and attorney's fees. It may annul the obligation to pay the principal of the notes if "rent" means rent for 1956 and 1957, as used in the decision. The Executor holds a decree in the Chancery Court for principal and interest and attorney's fees, $3,907.00 as of March 1, 1959 (R. 409). The Chancellor found no evidence of claim of set-off was offered and that the Executor is the legal holder. No evidence whatever is in the record reducing the Executor's right to the full amount of the notes. Therefore, the *de novo* finding of the State Supreme Court on a restricted record and without evidence is a denial of property without Due Process under the Fourteenth Amendment, or is a judicial abrogation of the obligation of contracts.

EXHIBIT 6 TO THE ANSWER.

(In Part.)

"January 29, 1957

"Mr. S. D. G. Hutton
Tchula, Mississippi

"My dear Sam:

"In effect you state in recent letters that a 1958 lease to the 209 acres is necessary for continuance of your livestock business, and for J. B. Hutton 3rd to go to college in 1958."

* * *

"If now you recognize Rosalind's ownership, which a lease would admit, discontinue the legal claims as to the land and the 1956-7 rent balances, pay the amounts now legally due, pay or secure the amount that will be due November 1, 1957, I offer you either a 1-year or 2-year lease or sublease for rent paid cash in advance at the same rental without discount you agreed to pay Mrs. Rosalind Gwin Hutton for 1956-1957."

* * *

"To put recognition of ownership of the land by Rosalind in proper form, which recognition would be implied by a lease, a consent decree to the pending petition should be signed by yourself, subject to the approval of the Chancellor, to the effect that the will devises the land to Rosalind, (and not to Rosalind III, as the Testatrix referred to the Granddaughter in the will). I have conclusive proof that the Testatrix intended to will the land to Rosalind, and not to the Granddaughter, Rosalind III, and I will exhibit this to the Chancellor."

* * *

"Yours truly,

s J. B. Hutton Jr.
J. B. Hutton Jr."

(Full text of letter is given on page 55 of the Record.)

APPENDIX B.

OPINIONS OF CHANCELLOR AND OF STATE SUPREME COURT, ITALICIZED TO SHOW POINT DECIDED BY CHANCELLOR AND ALSO PRETERMISSION BY HIM OF FINDINGS ON ISSUES OF FACT REQUESTED AND TO SHOW FINDINGS DE NOVO BY STATE SUPREME COURT IN EXCESS OF ITS AUTHORITY.

FINAL ORDERS AND DECREES UNDER REVIEW.

IN THE CHANCERY COURT OF HOLMES COUNTY, MISSISSIPPI.

S. D. G. HUTTON vs. J. B. HUTTON, JR., ET ALS	No. 9749
J. B. HUTTON, JR., EXECUTOR vs. S. D. G. HUTTON	No. 9811

OPINION OF THE COURT.

The Complainant S. D. G. Hutton, filed his bill in Cause No. 9749 on August 23, 1958, against J. B. Hutton, Jr., Mrs. Rosalind Gwin Hutton Johnson, and Mrs. Mary Ryburn McCutchan praying for the specific performance of a contract to sell the lands described in the bill and for damages for their delay in executing a deed to said lands. The Defendants filed their *answers* and *denied* that their offer to sell said lands *was accepted* by the complainant. They *alleged* that complainant's letter of March 6, 1957, in reply to letter of March 2, 1957, *did not accept* the offer unequivocally and unconditionally according to its terms, but *amounted to a counter proposal* or rejection of their offer and that the *offer of March 2nd was modified by the letter of J. B. Hutton, Jr., of March 5, 1957, prior to any acceptance by the complainant. They further alleged that complainant had never accepted the offer as modified and that on May 31, 1957, all offers to sell were withdrawn* by the defendants. *They further alleged* the *complainant was not entitled* to decree for *specific performance on account of his inequitable conduct.*

On October 4, 1958, complainant amended his bill to make J. B. Hutton, Jr., Executor of the Estate of Mrs. Rosalind Gwin Hutton, deceased, a party defendant.

On November 7, 1958, the defendants filed a cross-bill praying for damages or double rent for the use of said lands for the year 1958, in the sum of $4000.00 and for other relief. Cross-Defendant filed his answer denying the allegations of the cross-bill and that cross-complainants were entitled to the relief prayed.

On September 3, 1958, J. B. Hutton, Jr., Executor of the Estate of Mrs. Rosalind Gwin Hutton, deceased, filed a suit in the Circuit Court of Holmes County, Mississippi, being Cause No. 5764 on the docket of said court, against S. D. G. Hutton on two promissory notes dated June 25, 1955, for the sum of $1600.00 each, due on November 1, 1956 and November 1, 1957, bearing interest at the rate of 6% per annum after maturity and providing for 10% attorney's fees if placed in the hands of an attorney for collection. The defendant filed his answer and claimed a set-off in the sum of $746.68. On October 10, 1958, an order agreed to by all the parties was entered transferring said cause to this Court, the same being docketed as Cause No. 9811 on the docket of this court.

By agreement, these two causes were consolidated for trial.

On March 2, 1957, the defendants wrote the following letter to S. D. G. Hutton, and the same was delivered to him by Mr. Russ Johnson, husband of one of the defendants:

"March 2, 1957—Mr. S. D. G. Hutton, Tchula, Mississippi. Dear Sam: We will sell our rights by warranty deed in the 497 acres, more or less, (consisting of 209 acres of cultivated land and 298 acres of wood-

land), being the land devised us by the will, of Mrs. R. G. Hutton, and duly described in it, for $30,000 cash, reserving our mineral rights therein as given in the will. We will waive interest and fees on the 1956 rent note, and accept $1600 principal, as offered by you. We will ask you to pay the $1600 balance of 1957 rent agreed to with Mother and due 1 November 1957, because this item is governed by the will, as an asset applicable to estate debts, and the balance thereafter left is 1 4th Susan's. We will pay 1957 taxes. We would like for you to accept this offer, or decline it by letter within 2 weeks, and hold the offer open that long. If you accept it, and use due diligence, we will of course give reasonable time to close the transaction. Yours sincerely, J. B. Hutton, Jr.—Mary Ryburn Hutton McCutchan—Rosalind Hutton Johnson—"excluding of course the 112 acres in the cypress brake in a separate tract."

At the same time another note was delivered to the complainant demanding that he apologize to and retract statements made to Mrs. McCutchan and Rev. Charlton Hutton on *March 1, 1958*. The terms of this note were complied with and will not be copied herein.

On March 6, 1957, S. D. G. Hutton wrote the following letter to the defendants, to-wit:

"Dear Jim, Rosalind, and Mary Ryburn,—This is to acknowledge receipt of your letter of March 2, 1957. I hearby accept your offer as set forth in this letter. Upon the execution of the deed which I left in Mr. Harold Cox's hands on Monday, March 4, 1957, I will deliver to Mr. Cox for said deed a cashiers check for $30,000.00, and also a cashiers check for $3,200.00 to cover rent for 1956 and for 1957. Please have Mr. Cox notify me by telephone at 4071 Tchula (Collect) when he is ready for me to deliver checks. Yours truly, S. D. G. Hutton."

These two letters are relied upon by the complainant as constituting a contract to sell the lands mentioned in the offer of March 2, 1957, and described in the original bill.

On March 4, 1957, the complainant took to the office of Mr. Harold Cox, an attorney at Jackson, Mississippi, a deed from the defendants to the complainant, together with an escrow agreement. This was the deed referred to by the complainant in his letter of March 6, 1957. The deed and escrow agreement were as follows, to-wit:

"WARRANTY DEED

"For and in consideration of THREE THOUSAND AND NO 100 DOLLARS ($3,000.00), cash in hand to us paid, the receipt of which is hereby acknowledged and other good and valuable considerations, the receipt and sufficiency of which are also hereby acknowledged: we, J. B. Hutton, Jr., Rosalind Hutton Johnson, and Mary Ryburn Hutton McCutchan, do hereby sell, convey, and warrant, subject to the exceptions and reservations herein provided for, unto S. D. G. Hutton, the following described land situated in Holmes County, Mississippi, to-wit:

"A tract of land containing 507 acres, more or less, in Section 15, Township 15 North, Range 1 West, being all that part of said Section 15, lying South of Tchula Lake, North of the South line of Lots 15, 16, 17 and 18, and West of a North and South line located 4200 feet East off the West line of said Section 15; and being Lots 3, 4, 5, 8, 9, 10, 11, 12, 13, 16, 17, 18, and a strip off of the West side of Lots 6, 7, 14, and 15, of said Section 15, Township 15 North, Range 1 West. The foregoing land *being all* of the land owned by the late Mrs. Rosalind Gwin Hutton in Section *15*, Township 15 North, Range 1 West, at the time of her death, and which was devised to the grantors under Item III of the Last Will and Testament of the said Mrs. Rosalind Gwin Hutton

"The undersigned Rosalind Hutton Johnson is the same person as 'Rosalind Gwin Hutton' mentioned in Part 1 of Item III of said Last Will and Testament.

"The warranty herein contained is limited, as to each of the grantors, to that part of said lands owned by each of the granters.

"The grantors except from this conveyance and reserve unto themselves all of their respective mineral rights in and to said land.

"WITNESS our signatures on this the day of March, 1957.

J. B. Hutton, Jr.

Rosalind Hutton Johnson.

Mary Ryburn McCutchan."

(Acknowledgement Omitted)

"ESCROW AGREEMENT

"TO:

"Gentlemen:

The undersigned J. B. Hutton, Jr., Rosalind Hutton Johnson and Mary Ryburn Hutton McCutchan, hereinafter referred to as Sellers and S. D. G. Hutton, hereinafter referred to as Buyer, hand you herewith a warranty deed executed by the Sellers to the Buyer,

covering 507 acres of land, more or less, in Holmes County, Mississippi.

If, on or before September 1st, 1957, the buyer pays to you for delivery to the Sellers, the sum of $30,000.00, you are to deliver said deed to Buyer. If, by September 1, 1957, said sum of $30,000.00 has not been paid to you by Buyer as aforesaid, you are to deliver said deed to Sellers.

J. B. Hutton, Jr.

Rosalind Hutton Johnson

Mary Ryburn Hutton McCutchan

S. D. G. Hutton."

The offer of March 2, 1957, to sell was for $30,000.00 *cash* and the payment of the rent notes for 1956 and 1957. It will be noted the complainant's letter stated that, upon the execution of the deed left with Mr. Cox, he would deliver to Mr. Cox a *cashier's check* for $30,000.00 for the deed and *a cashier's check* for $3,200.00 to cover rent for 1956 and 1957.

The acceptance of an offer to sell must be in accordance with the terms and condition of the offer and must be unequivocal and unconditional. It cannot provide different or additional terms. If the acceptance changes any of the terms of the offer or adds other terms thereto

amounts to counter proposal or a rejection of the offer. In such a case the offer cannot be later accepted unless it be renewed by the offeror.

The purported acceptance in this case did not accept the offer requiring cash to **be paid**, but provided that payment **would be made** by Cashier's Checks.

> "A tender of a cashier's check is insufficient acceptance of the offer in option requiring optionee to tender agreed amount either in cash or by certified check prior to expiration of time specified." Words & Phrases, Vol. 6, page 259.

> "A cashier's check is merely a bill of exchange drawn by a bank upon itself." Lundy v. Greenville Bank & Trust Co., 174 So. 802, 179 Miss. 282.

The deed and escrow agreement were delivered at the same time to Mr. Cox by the Complainant to be executed by the defendants as referred to in his letter of March 6, 1957, to the defendants. The deed called for a cash consideration of $3,000.00 paid upon execution of the deed and recites other good and valuable consideration. The escrow agreement called for the executed deed to be delivered to an escrow agent to be delivered to complainant upon payment of the sum of $30,000.00 on or before September 1, 1957. Upon failure to make payment by said date, the deed was to be returned to the defendants. The deed and escrow agreement made no mention of the payment of the two rent notes in the sum of $3,200.00 for the years 1956 and 1957.

The letter of March 6, 1957, purporting to accept the offer of March 2, 1957, *was not an unconditional acceptance of the offer*, but *changed the terms thereof materially*. This letter constituted a *counter proposal* and amounted to a *rejection* of the original offer of March 2, 1957. *The*

offer of the defendants not having been accepted according to its terms, the defendants were not bound thereby.

The Court is of the opinion that *no binding contract to sell* resulted from the offer of defendants of March 2, 1957, and the purported acceptance thereof as contained in the complainant's letter of March 6, 1957. The specific performance of said contract and the demand of complainant for damages will be denied.

Since there was no binding contract for the sale of said lands, *it is unnecessary for the Court to pass upon the question as to whether* or not the remedy of *specific performance* should be *denied* to the complainant *because of any inequitable conduct on his part as alleged by the defendants.*

The defendants and cross-complainants in their cross-bill demanded damages or double rent for the use of said lands by the complainant and cross-defendant for the year 1958 in the sum of $4,000.00. The evidence shows that a reasonable rent for said land is the sum of $2,000.00 per annum. There is no proof of notice to the complainant and cross-defendant to quit the premises. The defendants and cross-complainants, J. B. Hutton, Jr., Mrs. Rosalind Gwin Hutton Johnson and Mrs. Mary Ryburn Hutton McCutchan, are entitled to recover from the complainant and cross-defendant the sum of $2,000.00 for the use and occupancy of said land for the year 1958, with interest thereon at 6% per annum from January 1, 1959. Cross-complainants are entitled to a writ of possession putting them in possession of said lands.

The original bill in Cause No. 9749 should be dismissed and the attachment levied therein should be quashed and discharged, and the defendants and cross-complainants are entitled to recover the sum of $2,000.00 with interest

at 6% per annum from January 1, 1959, and all costs hereof for which let execution issue.

In Cause No. 9811, the Court finds that J. B. Hutton, Jr., *Executor* of the Estate of Mrs. Rosalind Gwin Hutton, deceased, *is* the *legal holder* of the two rent notes and is entitled to maintain his suit thereon. *The Defendant offered no testimony to substantiate his claim of set-off.* Said notes have not been paid, and the plaintiff is entitled to recover of and from S. D. G. Hutton, defendant, the principal sum of $1,600.00 principal on *each* of said notes, being in the total principal sum of $3,200.00, together with *interest* at 6% per annum from maturity of each of said notes, together with *an attorney's fee* in the amount of 10% of the total amount of principal and interest due thereon.

The solicitors for the defendants and cross-complainants in Cause No. 9749 and for the plaintiff in Cause No. 9811 will draw decrees in both causes in accordance with this opinion. The decrees shall be drawn without delay and submitted to counsel opposite for their approval or objection as to form before submitting the same to the Chancellor for his signature.

Rendered at Yazoo City, Mississippi, this the 6th day of February, 1959.

s/ C. D. Williams,
Chancellor.

IN THE SUPREME COURT OF MISSISSIPPI

No. 41,428

S. D. G. HUTTON

vs.

J. B. HUTTON, JR., EXEC. OF THE ESTATE OF MRS. ROSALIND GWIN HUTTON, DECEASED, ET AL.

LEE, JUSTICE:

Sam D. G. Hutton, by his bill of complaint against J. B. Hutton, Jr., Mrs. Rosalind Hutton Johnson, and Mrs. Mary McCutchan, sought to require specific performance by them of an alleged executory contract to sell to him a 507 acre tract of land, known as the Cooper Place, in Holmes County, Mississippi.

The defendants had received their interest in this land under the last will and testament of their mother, Mrs. Rosalind Gwin Hutton, who died on November 23, 1955. The testatrix had divided the place into three separate tracts, insofar as the surface was concerned, and had left the east 169 acres to Mrs. Johnson, the center 169 acres to Mrs. McCutchan, and the west 169 acres of J. B. Hutton, Jr. Insofar as mineral rights were concerned, the place was divided into five separate tracts of 101 2/5 acres each, and these rights in those tracts were devised to Sam, Mrs. Johnson, Mrs. McCutchan, Susan Van Houten Smith, and Charlton D. Hutton.

The alleged contract to sell arose in this way. On March 2, 1957, Sam, from Tchula, Mississippi, called his brother-in-law, Russ M. Johnson, husband of Mrs. Rosalind Hutton Johnson, over the telephone at Jackson and expressed his desire to buy the Cooper Place. Johnson let the defendants, who were all in the city at the time, know what had happened and they, in turn, formulated their

proposition for the sale, based on two letters, which Johnson, by prearrangement, delivered to Sam at Canton that afternoon.

The letters were dated March 2, 1957. One was as follows: "Dear Sam: Before we transact business with you it will be necessary for you to give written expression of regret for and retraction of the statements you made to Mary Ryburn and Charlton on March 1, 1957. Yours sincerely, s Rosalind s Jim." The other, signed by J. B. Hutton, Jr., Mary Ryburn Hutton McCutchan and Rosalind Hutton Johnson, was as follows: "We will sell our rights by warranty deed in the 497 acres, more or less, (consisting of 209 acres of cultivated land and 298 acres of woodland), being the land devised us* by the will, of Mrs. R. G. Hutton, and duly described in it, for $30,000 cash, reserving our mineral rights therein as given in the will. We will waive interest and fees on the 1956 rent note, and accept $1600 principal, as offered by you. We will ask you to pay the $1600 balance of 1957 rent agreed to with Mother and due 1 November 1957, because this item is governed by the will, as an asset applicable to estate debts, and the balance thereafter left is 1 4th Susan's. We will pay 1957 taxes. We would like for you to accept this offer, or decline it by letter within 2 weeks, and hold the offer open that long. If you accept it, and use due diligence, we will of course give reasonable time to close the transaction. *excluding of course, the 112 acres in the cypress brake in a separate tract."

On March 4, 1957, Sam wrote as follows to Mrs. Johnson: "Any statement I made to any of you that any of you took offense to I express my regrets & or hereby retract same." On the same date, he had his attorney to prepare a deed to the property and the same was left in the hands of W. H. Cox that day

In a lengthy letter dated March 5, 1957, J. B. Hutton, Jr., among other things, advised Sam that he would have to pay over cash in exchange for the deed. On the same date Mrs. Johnson wrote Sam as follows: "Before Mary Ryburn, Jim and I confirm in writing any terms offered since the letter sent to you on March 2, 1957, and signed by the three of us, it will be necessary for you to comply with the requirement of the letter sent to you on the same day, by the same messenger, and signed by Jim and me.

"Mary Ryburn, Jim and I have agreed that every binding term or condition of any proposed business transaction between you and us must be in writing.

"Until you receive further written terms from the three of us the proposition stands as of our letters of March 2, 1957." On the next day, Mrs. Johnson wrote Sam again as follows: "I received today, your note of March 4, 1957.

"The letter sent to you on March 2, 1957 by Jim and me was very specific. It applied to, and specified, a definite time, place and persons.

"I refer you once again to our letter of March 2, for the note I received from you today does not fulfill its requirements."

On March 6, 1957, Sam wrote the defendants at Jackson, Mississippi, as follows: "This is to acknowledge receipt of your letter of March 2, 1957.

"I hereby accept your offer as set forth in this letter.

"Upon the execution of the deed which I left in Mr. Harold Cox's hands on Monday, March 4, 1957, I will deliver to Mr. Cox for said deed a cashiers check for $30,000.00, and also a cashiers check for $3,200.00 to cover rent for 1956 and for 1957.

"Please have Mr. Cox notify me by telephone at 4071 Tchula (Collect) when he is ready for me to deliver checks."

On March 8, 1957, Sam wrote Mrs. Johnson and J. B. Hutton, Jr., at Jackson, Mississippi, as follows: "In regards to your letter of March 2, 1957, which was delivered to me by Russ at Canton, and for which I suppose you have a copy.

"This is my written expression of regret for and retraction of the statements I made o Mary Ryburn and Charlton on March 1, 1957." Mrs. Johnson, on March 9, 1957, acknowledged receipt of this letter as follows: "Your letter of March 8, 1957, was received this morning.

"I have sent it, along with your first registered letter which was received earlier in the week, to Jim.

"As Mary Ryburn is here in Jackson at present, she has already had the opportunity to read these two letters from you.

"When Jim has had the same opportunity you may expect a written reply from the three of us."

In regard to the preparation of the deed, Mrs. Johnson, on March 20, 1957, wrote Sam as follows: "In my most recent letter from Jim, which came yesterday, he suggested that I write a note to you to let you know that we are working on the terms of a deed based on the offer you made to purchase his, my and Mary Ryburn's parts of the Cooper Place.

"When this work is done, we will of course send a copy to you that you too can review it and give it your careful consideration.

"I hope that you and yours are well—" In another letter to him, of date of April 13, 1957, she said: "We

are sending you a copy of the draft of a deed to Mother's part of the Cooper Place upon which we have been working for sometime, as you already know.

"Jim, Mary Ryburn, and I have given it our careful thought, consideration and approval. We are sending it to you now for your review and consideration. We are also sending a photo of the map of the place.

"If you approve the deed, or if you wish to make changes for our further consideration, please return both the deed and the map directly to Jim or to me. If you desire any other correspondence regarding the deed, please also send that directly to one of us.

"A copy of the deed has been sent to Susan and she has been asked to give her views, as has Charlton. Until we hear from them we cannot say finally whether the option provided in the deed, for a survey of mineral boundaries with a description and plat shall be exercised now and made a part of the deed, or whether this shall be done later.

"In order to avoid further delay, we are sending this draft of the deed to you for your consideration, while Susan and Charlton also have it before them for the same purpose.

"When, and if, we have the unanimous consent of all parties concerned, Jim will draw the final draft with acknowledgments.

"I trust you and your family are well."

On April 17, 1957, Sam received through the mail what was denominated as "Agreement and Warranty Deed Covering Rent and Exception Therefrom of Minerals in Place Thereunder", together with a plat of the property. The instrument covered six cap sized pages, written in

single space, and intended for execution by the three defendants, by the complainant, and also by Charlton D. Hutton and Susan Van Houten Smith, as devisees of mineral rights.

On May 20, 1957, Mrs. Johnson wrote Sam as follows: "Mary Ryburn, Jim and I want to know immediately if you have any further interest in the proposed sale of the land in Mother's part of the Cooper Place." And again on May 25, 1957, she wrote to inform him as follows: "Our offer to sell to you Mother's part of the Cooper Place expires five days from the date of this letter—"

Sam testified that, on May 30, 1957, he wrote the defendants at Jackson, Mississippi, the following letter: "I acknowledge receipt of your letter of May 25, 1957.

"I hereby reaffirm my acceptance of your offer as set forth in your letter of March 2, 1957.

"I hereby reject your Agreement and Warranty deed in draft form sent me under separate cover about April 17, 1957, and deny that it in any way complies with your offer as set forth in your letter of March 2, 1957." The defendants denied that they received the letter.

On May 31, 1957, Mrs. Johnson wrote Sam as follows: "In view of your failure to acknowledge all previous correspondence since April 13, 1957 and in view of your failure to reply to all inquiries during this same period of time, as well as your failure to comply with the stipulated conditions for completing the proposed sale of the land in Mother's part of the Cooper Place, we are unwilling to hold the proposals open longer. You are hereby thus informed. The proposal is dropped. We do not want to reopen it or to attempt further negotiations."

At the conclusion of the evidence, the learned Chancellor prepared and delivered a written opinion. He held that the defendants' offer of March 2, 1957, was to sell for $30,000 cash and the payment of the rent notes for 1956 and 1957; but that the complainant's letter of acceptance stated that, upon the execution of the deed which he had left with Mr. Cox, he would deliver to Mr. Cox a cashier's check for $30,000 for the deed and a like check for $3,200 to cover the rent for 1956 and 1957. Holding that a cashier's check is not actually cash, the Chancellor concluded that the acceptance was not in strict accordance with the terms and conditions of the offer, and that it amounted to a counter proposal or rejection of the offer. For that reason, he declined to decree specific performance. At the same time, he also referred to the fact that the deed and escrow agreement, which had been left with Mr. Cox, made no mention of the payment of the two rent notes in the sum of $3,200 for the years 1956 and 1957. In the suit which had been filed by J. B. Hutton, Jr., as executor, against Sam for the recovery of the *rent notes*, and which had been transferred from the circuit court to the chancery court and consolidated with the specific performance action, he awarded a *decree for the rent and interest and attorney's fees.*

From the final decree, Sam appealed.

The appellant contends that the decree, denying specific performance, based on the finding of the chancellor, is manifestly wrong because, he says, the offer, made by the appellees in their letter of March 2, 1957, was unequivocably accepted by his letter of March 6 thereafter; that the offer to sell the property "for $30,000 cash" meant a cash sale as distinguished from a sale on terms or credit, and did not mean that the appellees were each to be

actually paid by the appellant in specie or currency; and that the third paragraph of his letter with reference to the execution of the deed, left with Mr. Cox, and the delivery of cashier's checks for the consideration and for the payment of rent, were mere suggestions or requests looking to the expedition of the performance of the consummated contract.

On the contrary, the appellees say that the acceptance was not effected; that it introduced new terms and constituted a counter-offer, and therefore amounted to a rejection; that a cashier's check is a substantial variance from the term "cash" as used in the offer; that the appellant in fact abandoned the proposed contract; and that he was not entitled to specific performance on account of subsequent inequitable conduct.

It is definitely settled that the words of a contract should be given a reasonable construction, and that courts "must, if possible, ascertain and give effect to the mutual intention of the parties, so far as that may be done without contravention of legal principles". See *Rubel et al., Executors*, v. *Rubel*, 221 Miss. 848, 75 So.2d 58, and the authorities there cited.

This Court, in *Welch* v. *Williams*, 85 Miss. 301, 37 So. 561, observed that the general rule, in reference to the enforcement of specific performance of contracts, is that "the contract must be specific and distinct in its terms, plain and definite in its meaning, and must show with certainty that the minds of the parties had met and mutually agreed as to all its details upon the offer made, upon the one hand, and accepted, upon the other. If any of these requisites be lacking, specific performance will not be decreed by a court of equity." This rule was reaffirmed in *Phip* v. *Dana*, 121 Miss. 697, 83 So. 745, and

Fowler v. *Nunnery*, 126 Miss. 510, 89 So. 156. See also 12 Am. Jur., Contracts, Sec. 53, pp. 543-544; Williston on Contracts, Secs. 72 and 76, pp. 127 and 132.

Beyond question, the appellees, by their letter of March 2, 1957, made an *unconditional offer to sell* to appellant, by warranty deed, their rights in the 507 acres of land, more or less, devised to them by the will of their mother, for $30,000 cash, with an express reservation to them of their mineral rights as given in the will. Besides, their demand as to payment of the 1956 and 1957 rent and their assumption of 1957 taxes were clearly stated. They thereby agreed to hold this offer open for two weeks and to give appellant the *right* to accept or decline by letter within that period of time. The offer was certainly clear and unambiguous; and, if it was accepted in the manner required, the contract was binding on all of the parties. *Holifield* v. *Veteran's Farm & Home Board*, 218 Miss. 446, 67 So.2d 456.

There was every reason for the court to do so, and it found that the required apology was adequate and sufficient.

The question is whether Sam's language, to-wit, "upon the execution of the deed which I left in Mr. Harold Cox's hands on Monday March 4, 1957, I will deliver to Mr. Cox for said deed a cashiers check for $30,000.00 and also a cashiers check for $3,200.00 to cover rent for 1956 and 1957" constituted a counter-offer and therefore amounted to a rejection of the appellees' offer, or whether it was simply a suggestion to expedite the performance of the consummated contract.

In Williston on Contracts, Vol. 1, Sec. 79, p. 261, it is said: "Frequently an offeree while making a positive acceptance of the offer, adds as a request or suggestion that

some addition or modification be made. So long as it is clear that the meaning of the acceptance is positively and unequivocally to accept the offer whether such request is granted or not, a contract is formed." See also 91 C.J.S., Vendor & Purchaser, Sec. 31b, p. 882, where it is said: "If an offer is accepted as made, the acceptance is not qualified or conditional because of the expression of a hope, request, or suggestion, or because of the insertion of an immaterial variation or condition."

In *Crenshaw Bros. Seed Co. v. Rauch*, 112 Miss. 330, 73 So. 58, the appellee and appellant, by correspondence, had agreed to sell and purchase, respectively, 450 bushels of peas, f.o.b. Tampa, Florida; and the appellant, by letter, confirmed its agreement to purchase the peas, "if first-class stock". The appellee had shipped 175 bushels of the peas before the receipt of the above mentioned letter. But because the communication called for "thoroughly clean peas and first-class stock", the appellee, according to his version, considered the contract canceled as he had not sold that grade of goods. This Court, in holding that the appellant was entitled to a peremptory instruction for such damages as it sustained, said: "If the sort of peas mentioned in the plaintiff's letter were not the kind stipulated for in the original contract, the appellee could have insisted on the appellant standing by the contract and receiving the peas contracted for. The appellant received and paid for one hundred and seventy-five bushels of the peas contracted for, and the appellee could not relieve himself from his contract without offering to carry it out under the terms as originally stipulated. The appellee not only failed to tender a performance of his part of the contract, but repudiated the contract by a positive refusal on his part to carry it out." See also *Turner v. McCormick*, 67 L.R.A. 353, a West Virginia case; *Martindale v. Fiduciary*

Counsel, 26 A.2d 171; 30 A.2d 281, a New Jersey case; *Skinner* v. *Stone*, 222 S.W. 360, an Arkansas case; *Rucker* v. *Sanders*, 109 S.E. 857, a North Carolina case; *Whelchel* v. *Waters*, 111 S.E. 25, a Georgia case; *Corner* v. *Britt*, 85 S.E.2d 888, a North Carolina case; *Valashines* v. *Komuto*, 124 N.E.2d 300, a New York case; *Horgan* v. *Russell*, 140 N.W. 99, a North Dakota case.

For instance, in *Martindale* v. *Fiduciary Counsel*, *supra*, it was said that "A good acceptance of an offer makes the 'contract' even if there is added to the acceptance a proposal relative to fulfillment of the contract." Likewise in *Horgan* v. *Russell*, *supra*, it was held that a demand, in the instrument of acceptance, which pertained not to the acceptance but to the performance thereof, did not invalidate the acceptance. To the same effect is *Skinner* v. *Stone*, *supra*, where the appellee, by his letter of July 5, accepted appellant's proposition, contained in his letter of June 28. The opinion said that the statement about sending the draft to the Merchants' & Farmers' Bank was not an additional and unagreed upon condition, but was a mere suggestion to expedite the consummation of a contract which the letter itself closed by accepting unconditionally appellant's offer to sell.

The appellees evidently understood Sam's letter of March 6, 1957, to be an acceptance of their offer. Their letters of March 20 and April 13 are convincing evidence to that effect. The deed, which Sam had proposed, obviously did not meet their approval because they thereafter submitted their own form to him for review and consideration. At no time did they make any objection whatever to his suggestion of payment of the consideration and the rent by cashier's checks. *The time for actual performance by the appellant in the delivery of the considerations*

never did arrive. Before the form of deed was agreed upon, the appellees repudiated their agreement.

As heretofore stated, the deed, which the appellees tendered, was prolix in form. Besides, it contained extraneous matters, and did not conform to the written offer to sell. It no doubt was the obstacle upon which the consummation of the contract foundered.

Appellees say that *Fowler* v. *Nunnery, supra*, is decisive in their favor in this case. But in that case, Fowler, living at Picayune, replied to Nunnery, living at Magnolia, "I will take fifteen hundred dollars cash for the land I own near Chatawa; this is net cash." Nunnery, in reply, said: "Mr. W. C. Fowler, Picayune, Miss. Dear Sir: Replying to your letter of the 2d inst., I accept your property at Chatawa, and herewith inclose deed for same, to which you will attach draft for fifteen hundred dollars and send same to the Citizens' Savings Bank, Magnolia, Miss., for collection." The opinion specifically pointed out and emphasized these facts: (1) The offer to sell was for net cash; (2) Nunnery's letter was not an unqualified acceptance of that offer; (3) In the previous correspondence, nothing had been said about whose duty it was to draft the deed; (4) The offer to sell was silent as to the nature and character of the deed which Fowler would make, whether quitclaim, or a special or general warranty; (5) Nunnery assumed the duty and wrote a deed; (6) This deed contained more land than Fowler owned and the description was also erroneous; (7) When Nunnery asked Fowler to sign the deed, he did not tender to him in cash the consideration, but instructed him to draw a draft on a bank at Magnolia, Mississippi; and (8) Since Fowler was required to send the deed to another town for collection, because it was not accompanied by a tender of the consideration in

cash, the offer of sale was not accepted according to its terms.

That case is unlike the one on the present appeal. *Here the appellant made an unqualified acceptance of the appellees' offer.* The appellees had agreed to sell their rights "by warranty deed". The appellant, showing his full purpose to comply with the terms of a cash, rather than a credit, sale, suggested that he would deliver for the deed cashier's check for the consideration of $30,000 and the rent of $3,200; and Mr. Cox lived in the City of Jackson, where Mrs. Johnson, the apparent spokesman of the defendants, also lived. It is clear that the contract in this case failed of performance on account of disagreement as to the terms of the deed, when, under the contract, there was no room for any substantial difference of opinion.

The appellees' offer to sell the property for $30,000 cash was *an offer of a cash sale* as distinguished from a sale on credit. "Cash" is the antonym of "Credit". See *Lee* v. *Cutrer*, 96 Miss. 355, 51 So. 808. In that case, Article 3 of the charter of the Bank provided: "The stock of said corporation may be paid for in cash or in monthly installments, or on check as the board of directors may from time to time direct, and the board of directors shall have the right to provide for the issuance of stock as payments are made and may receive payments in full of all stock subscribed for from any subscriber on such terms as may be fixed by general order of the board of directors." The appellee paid for his stock with a fee of $250 for services in the organization and the agreed price for furniture and fixtures in the amount of $1,750. The Court said that it was manifest that the word "Cash" was used "not to designate the medium of payment, but as a term meaning the opposite of credit," and that the appellee had paid his subscription to the capital stock of the bank in

full. See also *Van Decar* v. *Streeter*, 240 N.Y.S. 492, a New York case; *Duprey* v. *Donahoe*, 323 P.2d 903, a Washington case; *Parrish* v. *American Railway, etc., Corp.*, 256 Pac. 590, a California case; *McInnis* v. *Brown County*, 41 S.W.2d 741, a Texas case; *State* v. *Woodward*, 93 So. 826, an Alabama case; and *Palliser* v. *United States*, 136 U.S. 257, 34 L. Ed. 514.

The appellees, from their offer, did not expect to sell the land to the appellant on a credit. *The sale had to be a cash transaction*, that is, for "ready money or money in hand; either in current coin or other legal tender, or in bank bills or checks paid and received as money." *Palliser* v. *United States*, *supra*. According to the appellant's suggestion, when the deed had been executed, he would deliver the cashier's checks to Mr. Cox, whose office was in the City of Jackson. While a cashier's check is of course not currency, it represents, as a general proposition, ready money as distinguished from an ordinary credit. *Undoubtedly* the appellees did not contemplate that the appellant should, simultaneously with the delivery of the deed, produce coin and *currency* of the realm and actually pay the same over to them. *But if they did so intend, the appellant would have had the right to conform thereto at the time of the exchange.* Actually, however they at no time raised any question as to his suggested mode of payment.

In 92 C.J.S., Vendor & Purchaser, Sec. 252a, p. 117, it is said that "The purchaser is excused from payment if performance on his part is prevented by the conduct or interference of the vendor", and under paragraph b. thereof, p. 119, that "the purchaser is generally not bound to go forward with performance on his part as long as the vendor is in default with respect to acts required of him by the terms of the contract." *Mrs. Johnson's letter of May 31, 1957, brought the negotiations to an end.*

Obviously the only thing that would *bar* the *appellant* is the *statute of limitations*. But, since the suit was filed July 23, 1958, there was of course no bar of the action.

Appellees further say that appellant was guilty of inequitable conduct on account of the fact that, subsequent to the contract, he appealed on behalf of his minor daughter to the Supreme Court from a decree of the Chancery Court of Hinds County, in the case of *Hutton* v. *Hutton*, 233 Miss. 458, 102 So.2d 424, and thereby *attacked the title of Mrs. Johnson;* and besides, that he was *in default in the payment of rents.*

But the suggested deed, which appellant had his attorney to prepare, expressly provided in one paragraph thereof as follows: *"The undersigned Rosalind Hutton Johnson is the same person as 'Rosalind Gwin Hutton' mentioned in Part I of Item III of said Last Will and Testament" of Mrs. Rosalind Gwin Hutton.* It was under that part of the will that Mrs. Johnson received her request to the 169 acres that she purposed to convey. *The acceptance of a deed with that or a similar provision instead of constituting an attack on Mrs. Johnson's title would have clearly amounted to an admission of her title.* Besides when the appellant, on May 2, 1957, perfected the appeal, he did so not for himself but for the protection of the interest of his minor daughter. He evidently acted under the advice of learned counsel. The question on that appeal was *not* so devoid of merit as to constitute *inequitable conduct* on the part of the appellant in submitting the matter for review and final decision by the Court.

Neither did the appellant's *default* in the payment of rent make his conduct *inequitable because* the discharge of that obligation was fully provided for in the contract of sale and purchase.

Manifestly the court was in *error both* in declining to decree specific performance of the contract and in awarding judgment against the appellant *for the rent, interest thereon, and attorney's fees.* If specific performance had been required, simultaneously with the consummation of the contract, the obligation for rent would have been paid and discharged in accordance with the terms of the contract. Consequently the cause must be reversed and remanded, and the trial court is *directed to decree and enforce specific performance by each and every party to the contract of each and every act and thing necessary and proper for the full consummation of the contract in accordance with the terms and provisions thereof.*

REVERSED AND REMANDED WITH DIRECTIONS.

ALL JUSTICES CONCUR EXCEPT ROBERDS, HOLMES AND ARRINGTON, JJ., WHO TOOK NO PART

SUPREME COURT OF MISSISSIPPI

FINAL ORDERS AND DECREES UNDER REVIEW.

(R. 441, 487.)

Monday, April 4, 1960. Court Sitting

S. D. G. Hutton,

41,428 vs.

J. B. Hutton, Jr., Executor of Estate of
Mrs. Rosalind Gwin Hutton, Deceased.

This cause having been submitted at a former day of this Term on the record herein from the Chancery Court of Holmes County and this Court having sufficiently examined and considered the same and being of the opinion that there is error therein doth order and adjudge and decree that the decree of said Chancery Court rendered in this cause on the 14th day of March, 1959-be and the same is hereby reversed and the trial court is directed to decree and enforce specific performance by each and every party to the contract in litigation of each and every act and thing necessary and proper for the full consummation of said contract in accordance with the terms and provisions thereof. It is further ordered and adjudged and decreed that the appellant do have and recover of and from the appellees all of the costs of this appeal to be taxed, etc.

Minute Book "BM" page 142 (R. 441).

Monday, May 2, 1960. Court Sitting.

S. D. G. Hutton,

41,428 vs.

J. B. Hutton, Jr., Exec. Etc., et al.

This cause this day came on to be heard on the suggestion of error, the supplemental suggestion of error and im-

plementing motion filed herein and this Court having sufficiently examined and considered the same and being of the opinion that they all should be overruled doth order and adjudge that said suggestion of error, the supplement to the suggestion of error and the implementing motion, be and they are each and all overruled.

Minute Book "BM" page 158 (R. 487).

SUPREME COURT OF MISSISSIPPI

(Monday, July 11, 1960.)

S. D. G. Hutton,

No. 41,428

J. B. Hutton, Jr., Et Al.

This cause this day came on to be heard on the Motions of the appellees filed in this Court on the 28th day of June, 1960, and this Court having sufficiently examined and considered said motions and being of the opinion that the same should be overruled doth order and adjudge that said motions be and the same are hereby overruled.

(Record, p. 497.)